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Textbook

IN THE

Supreme Court of the United States

October Term, 1970
No. 156

GEORGE K. ROSENBERG, DISTRICT DIRECTOR,
Petitioner,

vs.

YEE CHIEN WOO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENT.

Statement.

The statement as set forth in the Petitioner's brief is a correct recitation of the facts involved in this case and the proceedings from the time of filing the application under Section 203 (a) (7) of the Act seeking classification as a refugee through the decision of the Court of Appeals for the Ninth Circuit.

ARGUMENT.

I.

Respondent Clearly Qualified for Refugee Classification Under Section 203 (a) 7 of the Immigration and Nationality Act.

Section 203 of the Immigration and Nationality Act of 1952, as added, 79 Stat. 912, 8 U.S.C. (Supp. V) 1153, provides in pertinent part:

> (a) Aliens who are subject to the numerical limitations specified in Section 201 (a) shall be allotted visas or their conditional entry authorized, as the case may be, as follows:
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> * * *
>
> (7) Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 201 (a) (ii), to aliens who satisfy an Immigration and Naturalization Service Officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their

usual place of abode. For the purpose of the foregoing the term "general area of the Middle East" means the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south: Provided, that Immigrant visas in a number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status.

The facts show that Respondent fled from China after the communist conquest of that country. They further show he reasonably fears to return to China, because as a former businessman in Shanghai whose business was expropriated by that regime, he would be persecuted as a capitalist, and as an opponent of that regime. As the District Court stated:[1]

"The uncontroverted facts are that plaintiff was a businessman, a capitalist, prior to the communist takeover. Shortly after the communists came to power most businessmen were purged and many executed. In 1952 plaintiff was arrested and interrogated for fourteen days. Only after revealing his financial holdings was he released. His business was subsequently confiscated by the State. Plaintiff left Communist China in 1953, penniless. He was allowed to leave only on the condition that he return. This, of course, he did not do.

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[1] *Woo v. Rosenberg*, 295 Fed. Supp. 1370 at 1372. [A-41-42].

> Therefore, either as a capitalist, an anti-communist, a Catholic, or a 'lawbreaker', plaintiff has good reason to fear persecution at the hands of the communists. While he did not convert to Catholicism until 1962, and at the time of his escape was not yet a 'lawbreaker', he was a capitalist and an anticommunist. This brings plaintiff within the requirements of section 203(a)(7)."

There is no contention Respondent is a national of his intermediate residence, Hong Kong, from whence he came to the United States. There is no dispute Respondent continuously resided in the United States over two years before he applied for adjustment of status. He has met all the requirements of the statute *as written* and his eligibility *thereunder as written* cannot, and, indeed, is not, disputed. A question only arises when the administratively-legislated additional requirement "be not firmly resettled" is considered. Petitioner concedes it has applied this requirement to all refugees seeking relief under this Act despite the absence of such language in the Statute. Nevertheless, the District Court found Respondent was not barred even by this standard, stating.[2]

> "Without expressing any opinion as to why Congress chose to omit the 'firmly resettled' provision in the amendments to the Refugee Relief Act of 1953, this court finds that plaintiff was never 'firmly resettled' and still qualifies as a refugee under the terms of Section 203 (a) (7). Accordingly, the District Director erred in denying plaintiff's application."

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[2]*Ibid.* A-44.

On appeal, the Court of Appeals for the 9th Circuit affirmed, but stated:[3]

> "Whether appellee was firmly resettled in Hong Kong is not, then, relevant. What is relevant is that he is not a national of Hong Kong (or the United Kingdom); that he is a national of no country but Communist China and as a refugee from that country remains stateless."

II.

The Clear, Plain Unambiguous Language of Section 203 (a) (7) of the Immigration and Nationality Act, Obviates Examination of the Legislative History of This or Prior Refugee Acts.

Petitioner has attempted to read into Section 203 (a) (7) the term "firmly resettled," and bases its entire argument on two specific acts, enacted 22 years and 17 years ago respectively, regarding the refugee problems after World War II. The first was the Displaced Persons Act of 1948, 62 Stat. 1009 (June 25, 1948), where Congress excluded those who, after fleeing from their home countries, had been received for "permanent residence" elsewhere. The act required as a condition precedent for entry into the United States, that the refugee not be "firmly resettled."

The next statute was the Refugee Relief Act of 1953, 67 Stat. 400 (Aug. 7, 1953), which permitted the admittance of 214,000 refugees within a three and one-half year period. Congress included as a condition precedent proof that the refugee was "not firmly resettled" elsewhere.

Petitioner concedes the statutes dealing with the refugees after 1953 make no mention of the term "firm

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[3] *Woo v. Rosenberg*, 419 F. 2d 252. [A-49].

resettlement." In the Refugee Act of Sept. 11, 1957 (71 Stat. 639), the phrase "not a national" was substituted.

This substituted language was repeated in the Fair Share Refugee Act of July 14, 1960 (74 Stat. 504, 505), and, also, in the Refugee Assistance Act of June 2, 1962 (76 Stat. 121).

It is difficult, therefore, to understand how the Petitioner can argue from this obvious change in statutory language that the present statute retains the "firm resettlement" concept. Congress has omitted the words "firmly resettled" and inserted the phrase "not a national" into Section 203 (a) (7). Congressional intent is crystal clear regarding Section 203 (a) (7). Looking into prior Congressional intent is not necessary because it is evident that Congress thus departed from its earlier rule requiring that a refugee not be "firmly resettled." What better proof could be provided than the fact that prior to the enactment of Section 203 (a) (7), three preceding refugee acts did not contain the term "firmly resettled"? There is, therefore, no need to resort to the legislative history of Section 203 (a) (7).

In *Hamilton v. Rathbone*, 175 U.S. 14 (1899), this Court said at page 421 referring to the then long-established limit on judicial construction of statutes:

> "Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to solve, but not to create an ambiguity. If Section 728 were an original act, there would be no room for construction. It is

only by calling in the aid of a prior act that it becomes possible to throw a doubt upon its proper interpretation. The word 'property,' used in section 728, includes every right and interest which a person has in lands and chattels, and is broad enough to include everything which one person can own and transfer to another. The main object of the revision was to incorporate all the existing statutes in a single volume, that a person desiring to know the written law upon any subject might learn it by an examination of that volume, without the necessity of referring to prior statutes upon the subject. If the language of the revision be plain upon its face, the person examining it ought to be able to rely upon it. If it be but another volume added to the prior Statutes at Large, the main object of the revision is lost, and no one can be certain of the law without an examination of all previous statutes upon the same subject."

To the same effect in construing the White Slave Traffic Act of 1910, this Court said in *Caminetti v. United States,* 242 U.S. 470 (1917), at page 490:

"Reports in Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation, *Blake v. National Banks,* 23 Wall. 307, 319; *Bate Refrigerating Co. v. Sulzberger,* 157 U.S. 1, 42; *Chesapeake and Potomac Telephone Co. v. Manning,* 186 U.S. 238, 246; *Binns v. United States,* 194 U.S. 486, 495. But, as we have already said, and it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken

as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent. See *Mackenzie v. Hare*, 239 U.S. 299, 308."

Again in *Osaka Shosen Kaisha Line v. United States*, 300 U.S. 98, at page 101, this Court stated on the subject:

"To say that the passenger had not been brought to the United States unless the intent was to leave him here, is not to construe the statute but to add an additional and qualifying term to its provisions. This we are not at liberty to do under the guise of construction, because, as this court has so often held, where the words are plain there is no room for construction. *United States v. Wiltberger*, 5 Wheat. 76, 95, 96; *Hamilton v. Rathbone*, 175 U.S. 414, 419, 421; *United States v. Hartwell*, 6 Wall 385, 396; *Crooks v. Harrelson*, 282 U.S. 55, 59-60.

It is argued that the statute is highly penal in character and should therefore be construed strictly. But the object of all construction, whether of penal or other statutes, is to ascertain the legislative intent; and in penal statutes, as in those of a different character, 'if the language be clear, it is conclusive.' *United States v. Hartwell*, supra, pp. 395-396; *United States v. Corbett*, 215 U.S. 233, 242; *Sacramento Navigation Co. v. Salz*, 273 U.S. 326, 329-330."

To the same effect, this court said regarding statutory construction in *Packard Motor Car Co. v. National Labor Relations Board*, 330 U.S. 485, at Page 492:

> "We are invited to make a lengthy examination of views expressed in Congress while this and later legislation was pending to show that exclusion of foremen was intended. There is, however, no ambiguity in this Act to be clarified by resort to legislative history, either of the Act itself or of subsequent proposals which failed to become law."

And in *Schwegmann Brothers v. Calvert Distillers Corp.*, 341, U.S. 384 (1950) at Page 396, Mr. Justice Douglas speaking for the majority said:

> "It is the business of Congress to sum up its own debates in its legislation. Moreover, it is only the words of the bill that have presidential approval, where that approval is given. It is not to be supposed that, in signing a bill, the President endorses the whole Congressional Record. For us to undertake to reconstruct an enactment from legislative history is merely to involve the Court in political controversies which are quite proper in the enactment of a bill but should have no place in its interpretation.
>
> Moreover, there are practical reasons why we should accept whenever possible the meaning which an enactment reveals on its face. Laws are intended for all of our people to live by; and the people go to law offices to learn what their rights under those laws are. Here is a controversy which affects every little merchant in many States. Aside from a few offices in the larger cities, the materials of legislative history are not available to the

lawyer who can afford neither the cost of acquisition, the cost of housing, or the cost of repeatedly examining the whole congressional history. Moreover, if he could, he would not know any way of anticipating what would impress enough members of the Court to be controlling. To accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country.

By and large, I think our function was well stated by Mr. Justice Holmes: 'We do not inquire what the legislature meant; we ask only what the statute means.' Holmes, Collected Legal Papers, 207. See also *Soon Hing v. Crowley*, 113 U.S. 703, 710-711. And I can think of no better example of legislative history that is unedifying and unilluminating than that of the Act before us."

And in *United States v. Public Utilities Commission of Calfiornia*, 345 U.S. 295 (1953) at page 319, Mr. Justice Jackson, concurring, warned of the hazard of the psychoanalytical method of statutory construction in saying:

"I should concur in this result more readily if the Court could reach it by analysis of the Statute instead of by psychoanalysis of Congress. When we decide from legislative history, including statements of witnesses at hearings, what Congress probably had in mind, we must put ourselves in the place of a majority of Congressmen and act according to the impression we think this history should have made on them. Never having been a Congressman, I am handicapped in that weird endeavor. That process seems to me not interpretation of a statute but creation of a statute."

III.

The Legislative History of Section 203 (a) (7) Does Not Support Petitioner's Contention That a Refugee Must "Not Be Firmly Resettled" to Be Eligible Under Section 203 (a) (7).

In the guise of seeking enlightenment regarding Congressional intent to be gleaned from Legislative History concerning a refugee's resettlement in an intermediate country, Petitioner devotes one-third of his brief to the Legislative History not of the instant statute, but of four prior Refugee Statutes (See Petitioner's Brief pp. 8-19). Respondent concedes that the Displaced Persons Act of 1948 (62 Stat. 1009) and the Refugee Relief Act of 1953 (67 Stat. 400) contained the requirement, *in haec verba,* that eligibility under those statutes required that the refugee not be firmly resettled. But there is no escape from the fact that the Refugee Act of 1957 (71 Stat. 643) omitted the words "not firmly resettled" and substituted instead the "*not a national*" limitation, the *same language found in Section 203 (a) (7) of the instant statute.*

Again in the Act of July 14, 1960, (74 Stat. 504-5), in the so-called "Fair Share" Refugee Act, Congress repeated this definition of refugee, and again omitted "not firmly resettled" as a requirement.

Also on June 28, 1962, Congress passed the Immigration and Refugee Assistance Act (76 Stat. 121) without the "not firmly resettled" language.

It is noteworthy that the Department of State recommended certain changes in the language of the "Fair Share" Refugee Act, specifically, to provide for (1) an annual admission of 10,000 refugees; (2) additional provisions for emergency situations; (3) a def-

inition of Refugee limited to those who had "not been firmly resettled." All of these recommendations were rejected by both House and Senate Committees (see p. 17 of Petitioner's Brief, footnote 17).

Senator Theodore Kennedy of Massachusetts, Chairman of the Subcommittee on Immigration and Naturalization of the Committee on the Judiciary, of the United States Senate, who presided over months of hearings on the Senate bill, explained the refugee portion thereof on September 17, 1965:[4]

> "As defined in this bill; refugees are those persons displaced from Communist dominated countries or areas or from any country in the defined area of the Middle East because of persecution, or fear of persecution, on account of race, religion or political opinion. *They must be currently settled in countries other than their* homelands." (italics supplied).

At least Senator Kennedy realized, if the Petitioner has not, that settlement in an intermediate country is a common course in the displacement of the refugee from his homeland. It is contended that Congress, as well, so comprehended and substituted "not a national" in the last three refugee statutes, including Section 203 (a)(7) of this Statute.

Thousands of pages of testimony preceding the 1965 amendments to the Immigration & Nationality Act of 1952 shed little light on the minuscule refugee portion of the statute which was finally enacted. (The main feature of the Bill, of course, was the abolition of the National Origin Quota System of selection of immigrants).

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[4]Congressional Record, p. 24227, Sept. 17, 1965.

Efforts to ascertain Congress' intent by reading the legislative history of this Act point to the morass into which one falls in this approach. It is not without reason this court has stated repeatedly, where statutory language is plain, resort to the history is unwarranted.

Hamilton v. Rathbone, supra;
Caminetti v. United States, supra;
Packard Motor Co. v. National Labor Relations Board, supra;
Schwegmann Bros. v. Calvert Corp., supra.

IV.

Congress Provided for a Reasonable Classification in Section 203 (a) (7) Disqualifying "Nationals", Rather Than Those "Firmly Resettled."

Nationality is an important status. It is distinguished everywhere, in all countries, from the inferior status of mere alien residents, or even permanent residents. For example, it is elementary that the right to vote and hold public office is almost everywhere restricted to citizens or nationals. Employment opportunities are sharply limited to citizens in many professions, and countless occupations. In California our Business & Professions Code excludes aliens from such employment as attorneys, surveyors, brokers, private detectives, and social workers. A United States Military Officer must be a United States Citizen. Aliens can be deported for countless reasons by the nation in which he resides. In the United States it has been estimated that there are 700 grounds for deportation. Nations do not, however, deport their own citizens. Aliens almost universal-

ly must register as such and maintain their status by regular renewal of registration (See Section 263, 5, 6, of I. & N. Act 1952 as amended (8 U.S.C. 3, 4, 5, 6).[5]

The Hong Kong authorities gave Respondent Woo a Certificate of Identity. That document is what its name implies. It identifies him as a resident of Hong Kong. This status is vastly distinguishable from that of a British Citizen or national. It is only this latter group Congress intended to exclude from Section 203(a)(7) eligibility, and for the good and sufficient distinction between *alien residents* and *citizens*, and the formers' disabilities and inferiority contrasted with the latters' rights and privileges.

V.

In 1968 the United States Entered Into a Treaty on Refugees Which Defines Refugee Like 203 (a) (7) Excluding, Only Those "Not Nationals."

The Protocol to the Convention Relating to the Status of Refugees has been acceded to by 27 countries including the United States on November 1, 1968. That Protocol defines refugee as:

> "A refugee within the meaning of the Protocol is defined in the same manner as one under the 1951 Convention except that the cut-off date in the Convention is eliminated. He is a person who:
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> ". . . owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear,

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[5]Immigration Law & Procedure, Gordon & Rosenfeld, Volume 1, p. 4-6, ¶4.16.

is unwilling to avail himself of the protection of that country; or who, *not having a nationality* and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." (Italics supplied).

His refugee status will cease to exist when the refugee:

"(1) . . . has voluntarily reavailed himself of the protection of the country of his nationality; or

(2) having lost his nationality, he has voluntarily reacquired it; or

(3) *he has acquired a new nationality, and enjoys the protection of the country of his new nationality;* or (Italics supplied)

(4) he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or

(5) he can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because the circumstances in connexion with which he has been recognized as a refugee

have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under Section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence."

It will not cover any person if:

"(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) He has been guilty of acts contrary to the purposes and principles of the United Nations."

Under this Treaty as well as Sec. 203 (a) (7) only nationals of the intermediate countries are barred, not those who might have become firmly resettled. If a conflict should arise between 203 (a) (7) and the later treaty, a different case would be presented to this court. No such conflict has arisen under this case. Respondent qualifies under both. This late expression in the form of a treaty, signed by the United States is a reaffirmation of the language in 203 (a) (7).

VI.

The Decision of the Court of Appeals for the Second Circuit in Shen v. Esperdy, 428 F. 2d 293 (1970) Can Be Distinguished From the Instant Case.

Shen had Chinese Nationality, a Chinese Passport, and resided in the only China the United States recognizes diplomatically, *i.e.* The Republic of China. Shen had full rights of nationality. He would plainly not qualify under 203 (a) (7) (iii) were he now applying at the Hong Kong Office opened by the Immigration and Naturalization Service in November of 1970 to accept such applications, as he is a *national* of a country in that area. The *Shen* decision is in error in failing to see this distinction, where it concluded:

> "The Broadest scope which the 'not a national' language can be afforded is that it merely states that applicants for conditional entries cannot be nationals of one of these seven nations within which they have applied. Thus we view the language of Section 203 (a) (7) (A) iii as relevant only to those aliens who apply for conditional entries in one of these seven countries." *Shen v. Esperdy*, 428 F. 2d 293 (1970).

Section 203 (a) (7) says applicants must not be nationals "of the countries *or areas* . . ." in which their applications are made (italics supplied). The Shen Court ignored the words "or areas," in interpreting the limitation on conditional entry applicants. Further, the language in Section 203 (a) (7) granting immigrant visas in lieu of conditional entries to residents of the

United States of two years, limits this relief to "such aliens," thereby compelling the conclusion that the same requirements of 203 (a) (7) applicable to outside-the-United States applicants, also apply to inside-the-United States applicants. Analysis of the footnote on page 298 of that decision 428 Fed. 293 (1970) shows the Second Circuit itself reached an incorrect conclusion, indeed, while at the same time accusing the Ninth Circuit Court of Appeals of making an absurd analysis.[6]

The Second Circuit clearly ignored the plain language of Section 203 (a) (7)(A) that refugee eligibility was limited to those who were Not Nationals of countries in the areas where applications were made. The court's extravagent statement:

> "We do not believe Congress ever meant that once someone has been a refugee he remains one for the rest of his life regardless of intervening events."[7]

only proves the Court of Appeals in Shen failed to read the Statute the way Congress wrote it. The Court of

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[6]"The absurdity of applying the 'not a national' language to aliens applying under the proviso is demonstrated by the fact that the requirement would always be satisfied by an alien who had overstayed his temporary admission to the United States. The Ninth Circuit interpreted the Act to say, in effect, 'not a national of the intermediate host country to which he has fled from his home country.' See 419 F.2d at 254. However, here the language of the Act is quite clear; section 203(a) (7) (A) (iii) states 'not nationals of the countries or areas in which their application for conditional entry is made.' Even if one could properly construe this language as applicable to applicants under the proviso, it would dictate merely that the alien could not be eligible if he was a national of the United States, the country in which his application was made."

[7]*Shen v. Esperdy, supra* at p. 302.

Appeals for the Ninth Circuit on the other hand correctly stated in its decision here appealed from:

> "In any event we cannot disregard the clear manifestation of congressional intent shown by the substitution, in 1957, of the status, 'not a national' for that of 'not firmly resettled' as formerly specified in the 1953 Act. Nothing in the legislative history advanced by appellant persuades us that Congress intended this substituted language to mean anything but what it clearly says."[8]

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully urged that the decision of the Court below be affirmed.

GORDON G. DALE,
Attorney for Respondent.

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[8]*Woo v. Rosenberg, supra* A-49.